United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

STUART STEINBERG, WILLIAM CAPO,
HOWARD KAYE, and JAMES PARKER,

Appellants

On appeal from Judgment of the United States District Court for the Southern District of New York

BRIEF FOR THE APPELLANT JAMES PARKER

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PRELIMINARY STATEMENT

James Parker appeals from a judgement of the United States District Court for the Southern District of New York (Ward, R.), entered on January 29, 1975, after a jury trial, which judgement convicted appellant of conspiracy to violate 21 USC §812, 841(a)(i) and 841(b)(1)(B) and violation of 21 USC §843(b). Mr. Parker was sentenced on Count I to a suspended sentence and placed on probation for a period of two years on condition that the defendant perform voluntary work on a regular basis to be arranged by the probation department and subject to the standing probation order of this Court. Imposition of sentence as to Count 5 is identical to that under Count I. The periods of probation imposed under Counts I and 5 shall be concurrent.

On appeal, Mr. Parker argues that (1) he was prejudiced by failure to instruct the jury on personal use, (2) the wiretap evidence against him was used contrary to congressional intent under 21 USC §843(b), (3) he was prejudiced by the variance in proof between the multiple and single conspiracy and (4) it was an abuse of discretion not to grant his motion for severance.

QUESTIONS PRESENTED

1. Whether the instructions to the jury on "distribute" or "possession with intent to distribute" were erroneous in that they never apprised the jury that possession for personal use was grounds for acquittal under federal law.

2. Whether the wiretap evidence used to convict James Parker of facilitating the conspiracy pursuant to 21 USC §843(b) was contrary to expressed congressional intent.

3. Whether the variance between the single conspiracy charged and the multiple conspiracy proved was prejudicial to defendant Parker.

4. Whether severance should have been granted at the close of the People's case.

STATEMENT OF FACTS

All of the members of the alleged conspiracy were part of what was known in a bygone era as a "fast" set. Their multifarious activities - the drugs (A-111), the sex (A-106), the gambling (Exhibit 2P1-p.3) - all were part of a life style that F. Scott Fitzgerald described as peopled by young men and women who have been everywhere, done and seen everything and whose tomorrows seem only to hold question-marks of ennui.

At the end of June, 1973, Stuart Steinberg is brought to the attention of the Federal Drug Enforcement Agents, who in the course of two weeks paid him $10,000.00 for purchases of a controlled substance, PCP (T59a-T80)*. At the close of one of the deals, a future order was placed with Stuart Steinberg for fifty pounds (T-81). This transaction which was to cost $680,000.00 (T-89) never was consummated. The Agents also asked Steinberg if he could supply them with cocaine (T-90) and he promised to check out "his people". (T-90).

Following this episode, Agent Brian Noone swore to an affidavit made to accompany an application by the United States Attorney for a wiretap to be placed on Stuart Steinberg's telephone (T-121). After Court approval, electronic surveillance began on July 26 (T-121).

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* T = reference to Transcript pages

A = reference to Appellant Parker's Appendix pages

(Reference to Exhibits are for those Tapes not included in Defendant's Appendix)

The conversations seized were the bulwark of the government's case. They provided the basis for the identification and later conviction of Stuart Steinberg's alleged co-conspirators.

The eavesdropping directly involving James Parker began almost as soon as the tap was in place. On July 26, he unfortuitously picked up one of the phones at Stuart Steinberg's and called "Sam", his supplier of hash oil (A-92). He wanted to buy an ounce but only a quarter of an ounce was available. In making the arrangements for the delivery and payment, he consults Stuart, in the background (A-93). He then tells Sam to bring it to Steinberg's house and get the money from him (A-95). Thereafter, Parker calls in to Steinberg's and talks to Sam who had since arrived there, about the original full ounce of oil for which he asked (A-97).

There is also a call, one of many, between Steinberg and Parker (A-88-91) where they pass the time of day and go on to discuss their individual entrepreneurial efforts. Parker, from his Wall Street office speaks of the "broader" stock market and "secondary stocks on the curve" and Steinberg discusses his "merchandise" and inability to "do" any "quantity" since "both dried up." (A-89)

These three conversations* were those which were relied on by the Government to make a prima facie case of conspiracy that

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* The other direct conversations, not all played at trial, involved Steinberg's supplying Parker with Qualudes, Steinberg's arrangements for a big party at his place, repayment of Parker's debts, plans made by Steinberg and Parker for an art investment, requests to borrow glass pipes, weekends at Fire Island, and two offers made from Steinberg and refused by Parker to buy PCP and Cocaine ("blow").

included James Parker.

There were also conversations which involved Stuart Steinberg and third parties discussing James Parker. There was one in which Steinberg told Steven Effron that "Parker will [be] here tonight" and that "he's the man" who can "talk to him" about "crude oil" (hash oil) (A-102). Another conversation between Steinberg and Effron discussed Parker's refusal to deal in "blow" (cocaine) with Steve Effron (A-107). Another tape between Steirberg and Stolzenberg recounted a party, the night before and Parker's oil." (Exhibit 1E-1) Big Sue Weinblatt and Steinberg discussed the profit made from selling Parker the "ludes" (A-109).

Conversations not involving Parker, revealed Steinberg's dealings with Kaye, Capo, and Durst, in an attempt to fill the DEA's fifty pound order (Exhibit 1D-3). They also showed distribution by Steinberg of seconals, tuinals, cocaine, etc. (A-111). In one conversation, Steinberg names his partners and distributors. (Exhibit 2J10)(Exhibit 1D5). They did not include James Parker.

All of these conversations resulted in an indictment for a narcotics conspiracy and for using a telephone to so facilitate that was handed down, sealed, in December, 1973. In February of the next year, arrests of the twelve people listed thereon, were made.

At time of trial, in January of 1975, before Judge Ward and a jury, in the Southern District of New York, only four defendants, Steinberg, Kaye, Capo and Parker, remained. Suzanna Werman had been severed, after an application by the government (T-4). Michael Durst was dead. The rest had pled to the indictment.

Defense counsel for James Parker moved for severance and/or for dismissal at the close of the government's case (T-440). He renewed these applications at the end of the trial (T-671). James Parker was convicted of both conspiracy and using the telephone to facilitate the conspiracy (T-941).

A motion was made for a verdict of acquittal and denied at time of sentencing (A-113). James Parker received a suspended sentence of two years on each count, to run concurrently, and a term of Special Parole.

POINT I

THE INSTRUCTIONS TO THE JURY ON "DISTRIBUTE" OR "POSSESSION WITH INTENT TO DISTRIBUTE" WERE ERRONEOUS IN THAT THEY NEVER APPRISED THE JURY THAT POSSESSION FOR PERSONAL USE WAS GROUNDS FOR ACQUITTAL UNDER FEDERAL LAW.

One of the inferences which could properly be drawn from evidence adduced at trial was that James Parker was involved with Stuart Steinberg's "drug-store" as a purchaser-user rather than as one of the people behind the counter. In the defense counsel's opening remarks (T-444-5) and again in summation (T775), this was the theory put forward - that the taped conversations proved nothing more than that James Parker had knowledge of the fact of Steinberg's business in light of his own buying, but that he had no notion of the scope of nor any investment in the multifarious dealings. In point of fact, James Parker's sole line of defense was that his association with Stuart Steinberg was with intent to possess not for purposes of distribution but for personal use.

It is rudimentary knowledge that the federal criminal law is statuatory and prosecutions are not viable under the Comprehensive Drug Abuse, Prevention and Control Act unless they involve distribution or possession with intent to distribute controlled substances. There is no prohibition in federal law against the possession for personal use. Thus a defendant who participates in a federal conspiracy for mere personal use and does not share the requisite federal conspiratorial intent could not be found guilty.

If we take the evidence in a light most favorable to the government and accept arguendo the contention that James Parker was "dealing" in the controlled substance, hash oil, the amounts referred to cannot give rise to an inference of distribution. United States v. Turner, 396 U.S. 398, 423, 90 S.Ct. 642, 24 L.Ed. 2d 610, 627 (1970); United States v. Gonzalez, 442 F.2d 698 (en banc)(2 Cir. 1971); United States v. Maher, 465 F.2d 1035 (5 Cir. 1972); United States v. Blake, 484 F.2d 50, 58 (8 Cir. 1973) However, where there is a conflict between the verdict and the sufficiency of the evidence, the rule, on appeal, is to resolve everything in favor of the verdict. United States v. McGuire, 381 F.2d 306 (2 Cir. 1967).

The problem James Parker raises herein is that the Jury never received any instruction regarding personal use. Indeed the instruction on "distribute or possess with intent to distribute" was so limited as not to give rise to any alternative, if unexpressed, theory. The Trial Judge said:

> First you must be satisfied that the conspiracy did in fact exist; that is that there was an agreement to deal in controlled substances.
>
> (A-29)
> (emphasis added)

> There must be proof beyond a reasonable doubt that Steinberg agreed with the alleged co-conspirators... to distribute or possess with intent to distribute controlled substances..."
>
> (A-33)

He went on to discuss the illegal objects of the conspiracy in terms of Schedule I, II and III controlled substances and that the government did not have to prove an agreement "to distribute

all of those substances." (A-34) Unfortunately the only discussion of the terms distributing or possessing with intent to distribute was in terms of the substantive acts alleged in the indictment to have been committed by Steinberg, Capo and Durst. (A-44-5) Thus even these linguistically limited instructions were further limited so as to appear only to deal with the crimes alleged in Counts 2, 3 and 4.

Compare the charge of Judge Frankel in a similar case, United States v. Moazezi, (S.D.N.Y. #74 CR 225, 1974) where repeating an earlier caveat as to personal use, he said

> Now, those counts charge that the possession was "with intent to distribute." I have talked to you about those words. I remind you that the statutes that concern us here do not forbid possession for strictly personal use. The forbidden possession must be with intent to distribute. I think I have told you -- I repeat -- there is nothing complicated about the word "distribute". To distribute in this context means to transfer or deliver, by sale or otherwise, to other people.
>
> (emphasis added)

A defendant is entitled to have justice "done in accordance with the rule of law [and] it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved beyond a reasonable doubt" United States v. Clark, 475 F.2d 240, 248 (2 Cir. 1973), Holland v. United States, 348 U.S. 121, 138, 75 S.Ct. 127, 99 L.Ed. 150 (1954). One of the essential elements of the crime of conspiracy alleged to have been committed by James Parker was the intention to distribute although only a general objection was

taken to the charge as given by defense counsel (A-86), the fact that the entire thrust of his case, from his opening statement to his final words of summation, had been personal use should have alerted the learned Trial Judge to the absolute necessity of such an instruction.

The jury took extra time before they reached the decision in Parker's case. We submit that this deliberation, while made in good faith, was outside their proper function, in that they had received no instruction on personal use to aid them in reaching a decision. They were thus forced to speculate, to make inference upon inference in order find James Parker guilty.

The jury having brought in a verdict as to the three other defendants (T-925) returned to deliberate. At 8:25 P.M., another, admittedly minor, faux pas took place when the Judge told the jury that they would have until 9:00 P.M. at which time the limousines would arrive to take them home. He added, "I will be out here awaiting word from you." (T-941) This, we submit, coupled with the faulty personal use instruction, may have been the proverbial last straw, for the jury reached a guilty verdict at 8:50 P.M. (T-941).

The wave theory of conspiracy - that when the tidal wave of evidence breaks, it sweeps all the defendants along with it - succeeded. We submit that this was repugnant to the "right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others" (emphasis added) Kotteakos v. United States, supra, at 775.

James Parker's defense to the felonies he was charged with was personal use. The amounts with which he was involved more

than justified such a defense. The lack of instruction may have contributed to an erroneous verdict. Therefore, we respectfully request a reversal.

POINT II

THE WIRETAP EVIDENCE USED TO CONVICT JAMES PARKER OF FACILITATING THE CONSPIRACY PURSUANT TO 21 USC §843b, WAS CONTRARY TO EXPRESSED CONGRESSIONAL INTENT

In proving their case against James Parker for use of a communications facility in furtherance of the alleged narcotics [21 USC 843(b)] conspiracy, the Government (T-804) adduced two conversations (Tape 1D-10)(Tape 2D-13), seized pursuant to a wiretap order. That fact is uncontroverted, for the entire Government case against James Parker consisted solely of such seized conversations. Such use of evidence seized as a result of a wiretap order does not square with the expressly stated Congressional intent of the use for this facilitation statute.

The predecessor of 21 USC 843(b) was 18 USC 1403, passed in 1956, when Congress addressed problems posed by increased narcotics usage. The development of that legislation (S3760) in the Senate is the basis for the contention herein that a wiretapped conversation may not be used to obtain a conviction under this statute. In order to grasp the import of what transpired then, it is necessary to recall that at that time the Federal Communications Act was in force which by §605 made it unlawful for anyone to intercept and divulge a conversation seized by means of a wiretap.

In 1956, the legislation introduced to combat drug traffic contained a provision eagerly sought by law enforcement officers, that would have now permitted Court-ordered wiretapping to produce "the necessary evidence to convict these violaters". When the bill was first debated in the Senate, 84 Cong 2 Sess. Cong. Record, 9035

(1956), it was challenged by Senator Wayne Morse. He proposed to fillibuster rather than give wiretapping even a limited stamp of approval for such "a nest [is] made to contain the egg of another precedent" 84 Cong 2 Sess. Cong. Record 9036 (1956), and called for the striking out of that section. He then proceeded to speak (Cong. Record 9036-9047). He remarked that when the bill was next under consideration it would warrant a "thorough discussion, ... to fully inform the American people." 84 Cong. 2 Sess. Cong. Record 9251 (1956)

After Memorial Day, 1956, the Senate re-convened. Apparently, Senator Morse had made his point for he proposed an amendment, agreed to by Senator O'Mahoney, the floor manager, which would substitute for the offensive wiretap provision, a means of prosecuting for use of a communication facility in connection with an illegal drug transaction. (It is to also be noted that the ostensible need for the section was for legal process to reach criminal higher-ups, the narcotics brokers who never touched the actual drugs.) This amendment (later to be codified at 18 USC 1403) read:

> Sec. 1407. Use of communications facilities - penalties:
> (a) Each use of any telephone, mail or any other public or private communication facility in the commission or in causing or facilitating the commission, or in attempting to commit any act or acts constitute a violation of or a conspiracy to violate sections 1402 or 1403 hereof, or section 2 of the Narcotic Drugs Import and Export Act, or any provision of the Internal Revenue Code of 1954, the penalty for which is provided in section 7237(a) of such code, as amended, shall be considered a separate offense punishable by a fine of not more than $5,000 and imprisonment for not less than 2 nor more than 5 years.

> (b) As used in this section, the term "Communication facility" means any and all instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by wire or radio or other like communication between points of origin and reception of such transmission.
>
> 84 Cong. 2 Sess. Cong. Record 9302 (1956)

What is crucial to the case at bar are the remarks made by Senator Morse subsequent to the reading of the amendment. He said:

> I submit, Mr. President, that my amendment is what I consider to be a reasonable compromise with the provision in the bill, but in the interest of legislative history let it be understood that I am submitting my amendment with the understanding, the intent, and the purpose that the amendment will not countenance in any way the tapping of wires to get evidence for prosecution, but when in the prosecution of a case evidence is brought forward which shows that someone used the facilities of communication, radio, writing, or any other facility, in order to violate the law dealing with the drug traffic, the evidence so arrived at, and not through any wiretapping means, can be the basis of prosecution and for finding a man guilty of a crime committed. That is the effect of my substitute amendment.
>
> (emphasis added)
> 84 Cong. 2 Sess. Cong. Record 9303 (1956)

S. 3760 passed the Senate and on June 18, 1956, the House version of the bill including the Morse Amendment, became law, entitled the Narcotic Control Act of 1956. The House Report (No. 2388, Committee on Ways and Means) aside from recommending passage of the facilitation provision, does not comment on the amendment nor on wiretapping. Neither the House Debates nor the Conference Report (No. 2546) mention either aspect.

After codification, the law was implemented by federal prosecutors. They were able to convict by using testimony that a call had been placed by a defendant in which he gave instructions for a heroin pick-up at a certain place, United States v. Cole, 365 F.2d 57 (7 Cir. 1966); United States v. Butler, 204 F.S. 911 (S.D.N.Y. 1962). Another case permitted a conviction based on telephone company records showing the date and place of interstate calls. United States v. Roviaro, 379 F.2d 911 (7 Cir. 1967).

In 1968 Congress passed the Omnibus Crime Control Act, Pub. L. 90-351, Title III which allowed wiretapping in limited circumstances and under strict judicial supervision. In enumerating the specific offenses for which the Attorney General might make application to gather evidence by means of a wiretap (18 USC §2516), Congress included:

> (e) any offense involving... the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs, punishable under any law of the United States.
>
> (g) any conspiracy to commit any of the foregoing offenses.

It is not clear whether this generalization covers the facilitation statute. As a guidepost, maybe the fact that Congress also failed to include 18 USC §1343 which provided for prosecutions in cases where wire, radio or television was used for fraudulent reasons, and also that they specifically included but by section number 18 USC §1084, transmission of gambling information by wire communication. Since that portion of the authorization section does not unequivocally state that such wiretap evi-

dence is available for anything but prosecutions for substantive drug offenses or conspiracies thereof, and since there was no debate on the subject, it does not appear that the original purpose of the Morse amendment should be bootstrapped out of existance.

Analyzing the intent of Congress is not a straightforward task but where an amendment such as the original facilitation statute is enacted and the legislature makes a particular point of memorializing such intent, logic would dictate that this cannot be eradicated without some showing of an equally unequivocal statement. See: Landis, Statuatory Interpretation, 43 Harv. L. Rev. 886, 888-93 (1930), Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947).

Then in 1970, the Comprehensive Drug Abuse, Prevention and Control Act (PL 91-513) was enacted in what was an all-out attempt to combat what was viewed by Congress as a war on the youth of this nation by drug traffickers. Parts of this act merely recodified existing sections of previously enacted law. The facilitating statute, 18 USC §1403 was repealed and replaced at 21 USC §843(b) under the aegis of the Justice Department. Some of the wording was changed to broaden the scope of the kinds of controlled substances for which there could be prosecution.

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs,

> signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

However, and what is crucial herein is that this was accomplished in an all but absolute silence by Congress. Neither the House Report (#91-1444), nor the Senate Report (#91-613), nor the Conference Report (91-1603) nor any of the debates in the Congressional Record, 91 Congress, 2d Session, Cong. Record 33603-33667, 35477-35559, 36585, 36651-36655, 36880-36885 (1970) make any mention of the facilitation statute much less the particular question regarding wiretap evidence.

Congress legalized interception and divulgence of some conversations in 1968 and re-enacted the facilitating provision in 1970 they never overrod the unusually clear intent behind the enactment of that particular section in 1956.

There have been few courts who have considered this statute at all since its original enactment and none on the precise point presented here. In United States v. King, 335 F.S. 523 (S.D. Cal. 1971) [destined to become one of the leading wiretap authorization cases 478 F.2d 494 (9 Cir. 1973)], the District Court ruled that the former facilitation statute, 18 USC 1403(a) was Constitutional.

In so doing, the only judicial comment which even approaches the point raised here on behalf of James Parker was made when they said that the re-enactment of the provision in 1970 negated the notion that Congress intended the enactment of the wiretap law of 1968, to effectively repeal this section (at 552). This does not come to grips with the argument advanced here that the use of wiretap evidence in a prosecution under 21 USC §843(b) is as imper-

missable now as it was under the acknowledged predecessor 18 USC 1403. Wiretapping, if it is not a complete substitute for the facilitating section, should be used only for those prosecutions in which there is evidence other than seized conversations.

Other cases subsequent to the re-enactment which mention the evidence for conviction involve a consensual phone call taped by law enforcement officers, United States v. Veon, 474 F. 2d 1 (9 Cir. 1973); the observed usage of a telephone to check on a mailed package of cocaine; United States v. Arbelaez, 368 F.S. 605 (D. Conn. 1974); the testimony of a government witness, United States v. Watson, 489 F.2d 504 (3 Cir. 1973); and in cases too numerous to mention, wiretapped conversations, i.e., United States v. Sisca, 503 F.2d 1337 (2 Cir. 1974). Only the last-mentioned would be obnoxious to expressed Congressional intent.

If the act of 1956 was envisioned as a tool that would enable law enforcement officers to apprehend those persons who could not be reached substantively, then current prosecutions become aberrational. Now a defendant may be convicted under the facilitating law, concededly passed in contemplation of a lack of wiretap evidence, but which is being used to ensnare, in a bizzare double-step, those persons whose wiretapped conversations are used first to prove substantive offenses and also as evidence of only one added fact, that they used a telephone. Such an overlap is not within traditional purposes of federal criminal law.

In the instant case, James Parker stands convicted of both the conspiracy to commit a substantive drug offense and of facilitating that conspiracy by means of the telephone. All of the evi-

dence against him consisted of the seized and recorded conversations. This was contrary to the expressed intent of Congress and although the question was not raised below for a ruling by the trial judge, the point is an esoteric one, not readily discoverable by even the most meticulously prepared counsel.

Although sentenced concurrently, appellant Parker is entitled to separate consideration of this question, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707 (1969). The arguments made herein are those of law, with no disputed factual matters, and are as such raised as Plain Error under the Federal Rule of Criminal Procedure Rule 52(b). United States v. Dornau, 491 F.2d 473 (2 Cir. 1974). James Parker has been twice branded felon as a result of this prosecution and we respectfully request the Court in its discretion, view as substantial the injustice of this in light of the expressed Congressional intent explored herein.

POINT III

THE VARIANCE BETWEEN THE SINGLE CONSPIRACY CHARGED AND THE MULTIPLE CONSPIRACY PROVED WAS PREJUDICIAL TO DEFENDANT PARKER.

The prime target of this prosecution, Stuart Steinberg, was, in the words of Assistant United States Attorney Mukasey, virtually running a drug store (T-444) for his own use and profit. The Trial Judge described the operation as akin to a truck terminal with Stuart Steinberg as the dispatcher of drug shipments in and out (T-450). He was, in street argot, the "Connection". Sellers sold to him and buyers bought from him. His conversations on the tapes, as he pursued fulfillment of orders big and small from his Manhattan townhouse, do not present a palatable picture.

Where do James Parker and Sarah Werman fit into this picture? It is the Government's contention that Parker bought hash oil from Sarah Werman in order to deal it to the other members of the conspiracy (T-23-4). The sole evidence of this transaction was two telephone conversations on Stuart Steinberg's phone (A-97-8) (A92-96). On the first call Parker called Sam and made arrangements to buy a quarter of an ouce of hash oil and gave her directions for its delivery at Steinberg's. A short time later he called there to see if the oil and Sam had arrived and spoke to her about the possibility of "doing" another ounce. She explained that it had to be ordered from Boston and that she would take an order. Parker, at this point -- it is hard to tell from the tape -- spoke to some people in the background, <u>wherever he was calling from</u>, and placed a somewhat equivocal order.

Even portraying the evidence in this light, most favorable to the Government, it is difficult to perceive Parker's dealings with Sam as being linked in any way to Steinberg's grandiose conspiracy. To be sure there are links between Steinberg and Parker. They were friends from college (T-472). They moved in the same spoiled social set. They frequently used drugs together. Parker had knowledge of the fact, if not the extent, of Steinberg's dealings. But, that Parker participated actively in the business cannot logically be inferred on the basis of the evidence adduced at trial. Using the Trial Judge's truck dispatcher analogy, (T-450), if the evidence proved Steinberg to be a big time dispatcher of tractor trailers; it also proved only that Parker had his own delivery panel truck and that these two "truckers" liked to indulge in the same vices. Is this facetious? We respectfuly submit that it is not.

Kotteakos v. United States, 328 US 750, 66 S.Ct. 1239, 90 L.Ed. 155 (1945), which may be the most often cited and least often controlling cases in federal criminal law, stands for the proposition that the Government may not at a mass trial present overwhelming evidence of a single conspiracy and then ask the jury to convict individual wrongdoers of each of many small conspiracies based on the big one. The repugnancy to this tactic, coming at the close in history of a valiant war against the threat of totalitarianism, was the unequivocal response of the judiciary of a great democracy to the concept of the mass trial in which individuals are imprisoned based on a mass adjudication of wrongdoing. Blumenthal v. United States, 332 US 539, 68 S.Ct. 248 (1947)

further refined Kotteakos conspiracy problems by stating that it was necessary for the government to prove that the conspiratorial agreements were tied together; to prove that each separate agreement did not have its own illegal ends and to prove that no conspirator had a "deal" that was not dependent on the conspiracy as a whole. This has remained the touchstone of multiple-single conspiracy law and we submit that under the proofs at this trial James Parker and Sarah Werman (whose name never surfaced again in any of the tapes) may have been engaged in wrongdoing with drugs but that there was no independent evidence to link either or both to Steinberg's deals. The intent to participate in Steinberg's distribution, a necessary element of the crime under the indictment, was never proved. United States v. Aviles, 274 F.2d 179, 189 (2 Cir. 1960); United States v. Ageuci, 310 F.2d 817 (2 Cir. 1962).

To continue to view the case in the light most favorable to the prosecution, it is a necessary inquiry into the nature of this particular conspiracy, whether it is of the spoke-hub variety or the chain-link. If it is the former, we believe the Kotteakos - Blumenthal positions to be dispositive. If it is the latter theory, more recent Second Circuit cases are to the point. United States v. Bynum, 485 F.2d 490 (2 Cir. 1973) describes the chain-link as an organization in which each member was aware of the scope of every other member's performance and that each level depended upon the other. "Mutual interdependence was fully understood and appreciated." at 495. Where was the interdependence proved between Parker and Steinberg? The Assistant United States Attorney stated (T-445)

that Parker knew he was playing in the big leagues. It does not so appear in the evidence. Even if Parker knew he was "playing" he was completely unaware of the nature of the league. Parker was not just someone dragged in from the street (T-447), but the only inference from the evidence seems to suggest that James Parker was a drug user -- never a dealer. His conversations, unlike those of his co-defendants, do not refer to members of the working conspiracy nor to any of the deals except in a general way.

There is one other troublesome conversation and that involves a remark during a telephone conversation between Steven Effron and Stuart Steinberg (A-102) that Parker is the man to see for "oil". The remark is, of course, hearsay, and not admissable unless the single conspiracy is proven prima facie against Parker. It is the appellant's contention that since the government adduced no evidence of Parker's intent to distribute, no such conspiracy was proven. Although the Trial Judge held that a prima facie case was made by the initial conversation (A97-8) seized between Werman and Parker, it does not appear that any real link was established between Steinberg and Parker and Werman, except that Parker was borrowing money (A98). He seemed to do that fairly frequently (Exhibit 2P1 p. 3) (A100).

A recent case deals with this difficulty. In United States v. Fantuzzi, 463 F.2d 683, 689 (2 Cir. 1972) it was held that there was insufficient evidence of words or acts to establish one defendant as a member of the conspiracy. At most, the evidence established association. A hearsay remark offered subject

to connection was therefore disallowed although probative on that defendant's participation. He was thereupon acquitted.

In the instant case, there are similar facts of association, not participation nor action to make the venture succeed. United States v. Peoni, 100 F.2d 401 (2 Cir. 1938); United States v. Ragland, 375 F.2d 471 (2 Cir. 1967). The statement to Effron made in typical loose fashion by Steinberg, is inadmissable because it fits into no known exception to the hearsay rule and at best is highly unreliable.

There is also the notion under a line of Second Circuit cases that it is permissable to infer intent and knowledge of conspiracy. United States v. Bruno, 105 F.2d 921 (2 Cir. 1939). This has been criticized by other circuits as "going far beyond the Supreme Court in Blumenthal." United States v. Baxter, 492 F.2d 150 (9 Cir. 1973). In the instant case it does not appear that the Government had sufficient evidence to enable a jury to infer Parker's knowledge that he was part of something bigger or that the outcome of his enterprise was dependent on the larger organization. There is just no link.

To recapitulate, the evidence proves that Parker and Werman had an agreement between them for Parker to buy and Werman to sell hash oil. There is no credible proof that Parker ever did any selling to third parties. Parker knew what Steinberg was doing. This may be inferred from some of the conversations (A89). However he was no more associated with the venture than the person in the street who ultimately received Steinberg's "57 Varieties". Parker was a user not a seller. Many of the other conspiratal conversa-

tions prove this. (i.e., Steven Effron wanting to sell him some "blow" (A-107). Stuart Steinberg's remarks to Sue Weinblatt regarding the profit they made on Parker (A109).

If there was such a variance, recent Second Circuit opinions have held that the defendant must be prejudiced by such. United States v. Miley, ___ F.2d ___, (2d Cir. No. 536-40, March, 1975) In the instant case, the defendant Parker's right to a fair trial has been precluded by the definitional types of prejudice alluded to in Miley, supra. First, the crimes of these various appellants are markedly different from his (Miley at 2393). They were dealing for 50 pounds of deleterious narcotics for $650,000.00. James Parker bought ¼ ounce with a borrowed $32.00./ (A-100) The other defendants had repeated dealings over what appear to be long periods of time. James Parker's "deals" were, as revealed by the wiretap, social, and in this group, that meant drug usage. However, there was substantial disparity between their crimes and his and the spillover of evidence was highly prejudicial.

The second aspect of prejudice, which Miley alluded to was the reception of hearsay evidence from the members of one conspiracy to the detriment of the members of another. In this case, if we assume arguendo that there was a Werman-Parker conspiracy, then there was detrimental hearsay regarding that agreement which was admitted from conversations between members of the Steinberg conspiracy. Most memorable is a conversation between Steinberg and Stolzenberg regarding the hash oil supplied by Sam for the party the night before (Ex. 2E1P. 10-12) and of course, the previously mentioned Effron-Steinberg conversation re Parker as a

source for hash oil (A-102). If James Parker was not a part of the same conspiracy as Steinberg-Stolzenberg-Effron, the evidence was inadmissable, because a jury hearing it may have been rendered more receptive to draw a conclusion of guilt without cross-examination or confrontation. Indeed, even the United States Attorney resorted to the Effron-Steinberg conversation to push Parker's participation "over the line" in the argument made at the close of the prosecution (T-441-2).

At sentencing, the learned Trial Judge in denying a motion to acquit the defendant Parker under Rule 29, (A-113), held that there were no multiple conspiracies (A-114). In his view of the the case, Mr. Parker "relayed messages" in furtherance of the conspiracy with regard to at least "one drug other than hash oil" (A-114). He also found that Mr. Parker had been active and aware and that the jury had focussed clearly upon him (A-114). Unfortunately, the trial judge did not state what evidence he had focussed clearly upon in making the decision and his remarks unfortunately only serve to further cloud an already murky scene.

We respectfully request that the Court reverse on this point. The prejudice which accrued to the defendant and the violence done to the American concept of a fair trial so mandates.

> Numbers are vitally important in trial especially in criminal matters. Guilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application."
>
> Kotteakos v. U.S., supra, at 772, 1571.

POINT IV

SEVERANCE SHOULD HAVE BEEN GRANTED AT THE CLOSE OF THE PROSECUTION'S CASE

James Parker's repeated requests for severance at trial were all denied. (T-666)(T-416) However, now viewing the trial with the perspective of time, it appears that the evidence against him was "so little" and "so vastly disproportionate" in comparison to that admitted against the remainder of the defendants, United States v. Rizzo, 491 F.2d 215, 218 (2 Cir. 1974); United States v. Capra, 501 F.2d 267, 281 (2 Cir. 1974), that a substantial question is raised concerning which of the evidence convicted James Parker. Even assuming a facially sufficient case, and full jury understanding of a most necessarily complex set of judicial instructions (T-842, et seq.), there is still the leverage of an overwhelming case against the other defendants being imputed to Parker. Such spillover is inimical to fairness.

As was stated in United States v. Miley, supra, District Courts are loath to grant severance on pre-trial motions because they "may not be certain whether the evidence will support the single conspiracy charge" Miley at 2393. At the close of the prosecution's case, the Trial Judge remains reluctant because of the time and effort already expended (at 2393). There is also the chance that the jury will acquit and moot the question (at 2394).

In Miley, supra, severance questions were raised anew at a second trial after the government's case was known. This changed the standards under which the trial court should have judged the motions.

In the case at bar, it was an abuse of discretion for the Trial Court not to have re-aligned its perspective. James Parker's misjoinder with Stuart Steinberg et al. might have been rectified at the close of the prosecution with little or no loss of Government time and energy.

The trial judge was sympathetic to the idea of misjoinder between those accused of large scale participation and those who supposedly were talking of "a quarter of an ounce." (T-415) However, he used that rationale to deny defendant Kaye's motion rather than to grant defendant Parker's.

Sara Werman, the co-defendant who joined Parker in both the overt act and Count Five of the Indictment had been severed at the opening of trial (T-2), because the Government elected to take an interlocutory appeal after the granting of a motion to suppress a statement of hers made at the time of arrest (T-2). Severance of James Parker thus, would not only have been fair, it would have been logical from the Government's viewpoint. Whatever one's view of the nexus between Parker - Werman and the Steinberg conspiracy, there is little room for doubt that the evidence proved a joinable link between James Parker and Sara Werman.

Therefore, we respectfully request that the Court reverse, or in the alternative grant James Parker a new trial.

POINT V

THE DEFENDANT PARKER RESPECTFULLY REQUESTS THAT HE BE ALLOWED TO JOIN IN ANY OF THE ARGUMENTS OF HIS CO-DEFENDANTS WHICH ARE APPLICABLE TO HIM IN THE CASE AT BAR

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of May, 1975 at No. N. Courthouse, N.Y.C. deponent served the within Brief upon N. Tattoni the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 19 day of May 1975

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973